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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No .....

PHILLIP BURROUGHS, CARLO CANTANIA, WARREN BURNS, JOHN POPOFF, HOWARD BALDWIN, LEO BARNES, LeROY McCOY, RONALD YBARRA, ORLANDO SENA, HARRY HANSON, DAVID BARBOSA, GILBERT ESCARCEGA, ANDREW BALANDIS, EDWARD HERNANDEZ, EZEKIEL PEREZ, CRUZ A. VALDEZ, WILLIAM CORTEZ, LOUIS CISNEROS, JR., DENNIS W. SMITH, LYLE BROWN, LOUIS CISNEROS, SR., AL SILVA, JOHN GREGORIO, WAYNE VAN KIRK, MANUEL A. LONGORIA, EDGAR C. DODD, JR., J. F. LULL, HECTOR CARREON, LEONARD SANTOS, RAYMOND CARILLO, JESUS E. SANCHEZ, ED JENSEN, MANUEL BELMONTES, RONALD HESTER, MICHAEL TICKENOFF, JACK LINDSAY, JAMES PARRINI, WESLEY BURTON, ROBERT WAKEFIELD, RALPH DESPER, CHARLES REBOLLEDO, RICHARD ALVAREZ, BILLY L. COOKE, RONALD EUGENE HARRUFF, CLINTON MOORE, RICHARD WEILAND, HUERTA PANTALEON, CHARLES TUCKER, TONY MOSQUEDA, WALTER M. TARNOFSKY, ROBERT A. McGRANAHAN, HENRY R. SZYMANSKI, ALBERT S. LOPEZ, MAURICE RICHARDS, ROSS C. LAGANA, ALLAN JACKSON, FELIPE GUERRERO, DANIEL GONZALES, J. A. GANJIAN, DAN GARCIA, RUBEN GARCIA GALINDO, LEO FLORES, JULIUS DECKER, RAUL M. CARDENAS, MARVIN L. BONDURANT, JOE M. AYALA, JUAN GUILLEN PEREZ, PAUL LOVELIND, ALBERT EDELMAN, WILLARD J. MULLER, JOHN DRELLESHAK, RAYMOND ESTRADA, ROBERT MOLEY, HOWARD MERRITT, HENRY TORRES, JOHN COLLINS, HAROLD HAMMER, BERNIE ORTIZ, VERN O. FREIBURGER, FREEMAN E. RICHARDSON, PETER BACA, RAYMOND H. HOFFMAN, ROBERT H. FOX, DAVID KERSCH, LARRY PARSLEY, FRANK CABRAL, RICHARD LaGASPI, LUIS J. ACOSTA, JOSEPH S. RAMOS, DONALD PALMER, DAVE CASTILLO, WALTER C. HOSMAN, JACK L. HIGHAM, individuals, and DOES I through XX, inclusive,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation; DELTA LINES,

INC., a California corporation, ALLTRANS EXPRESS, INC., a California corporation, SHIPPERS EXPRESS COMPANY, a California corporation; CALIFORNIA MOTOR EXPRESS, L.T.D., a California corporation; DEPENDABLE TRUCK LINE, a California corporation; METROPOLITAN TERMINAL, a California corporation; SIGNAL TRUCKING, a California corporaton, SMITH TRANSPORTATION, a California corporation; DART TRANSPORTATION, a California corporation; WILLIG FREIGHT LINES, a California corporation, TIME D. C., a California corporation; IMPERIAL TRUCKING, a California corporation; STAR TRUCK & WAREHOUSE, a California corporation; KERN VALLEY TRUCKING, a California corporation; VICTORVILLE BARSTOW TRUCKLINES, a California corporation; DiSALVO, a California corporation; CALIFORNIA TRUCKING ASSOCIATION, a California corporation; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 357; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 208; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 396; INTERNATIONAL BROTHERHOOD OF TEAMSTERS JOINT COUNCIL OF TEAMSTERS LOCAL 42, and DOES I through XX, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Central District of California. Said judgment affirmed the District Court's denial of permission to file an out-of-time appeal from a final order granting judgment.

OPINION BELOW

The opinion of the aforesaid Court of Appeals is attached hereto as Appendix "A"

JURISDICTION

The decision of the Court of Appeals was filed on April 10, 1973

The jurisdiction of this Court is invoked under 28 U S C § 1254

QUESTIONS PRESENTED

I Did the court abuse its discretion in denying petitioners permission to file an out-of-time notice of appeal?

II Did said denial deprive petitioners of due process of law and the effective assistance of counsel, as guaranteed by the Fifth Amendment, United States Constitution?

III Did the negligence and willful misconduct of petitioners' trial counsel constitute "excusable neglect"?

STATUTES INVOLVED

The statute involved is 28 U S C § 2107, providing that a notice of appeal must be filed within thirty days from the entry of judgment or an additional thirty days if the District Court finds excusable neglect.

RULES INVOLVED

The rules involved are Federal Rules of Appellate Procedure, Rule 4(a), providing, as does 28 U S C § 2107, *supra*, that a notice of appeal must be filed within thirty days from the entry of judgment or within an additional thirty days if the District Court finds excusable neglect, and Rule 26(b), providing that the court may not enlarge the time for filing a notice of appeal

STATEMENT OF THE CASE

The appeal to the Ninth Circuit herein is from an order denying petitioners permission to file an out-of-time notice of appeal from orders granting summary judgment and dismissing the complaint with prejudice, or, in the alternative, an original application to the Ninth Circuit for permission to file such notice of appeal.[1]

The case at bar is one of a series of cases arising out of a so-called "wildcat" Teamsters strike that swept the trucking industry in the Los Angeles area during the spring of 1970 (see, *e.g.*, *Elrod v. Western Conference of Teamsters*, 9th Cir. Nos 71-2755 and 71-2846)

Petitioners originally filed their action in the Superior Court of the State of California, for the County of Los Angeles, against their employers for wrongful discharge and against their unions for breach of duty of fair representation.

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[1]Petitioners inquired of the Clerk of the Ninth Circuit Court of Appeals as to proper procedure to follow. The Clerk said that he did not know, but to be on the safe side, to proceed both by way of appeal from the order and by an original application to the Ninth Circuit.

The action was removed to the United States District Court for the Central District of California, by two separate petitions for removal, and assigned separate case numbers (71-572-AAH and 71-573-AAH). The cases were later consolidated for hearing (CR 100/1-5; CR 104/1-4) [2]

Petitioners retained David M. Raatz, Esq. to file the action and to represent them after the case was removed to the United States District Court (CR 32/6-10). The matter was set down for hearing on respondents' motions to dismiss and/or for summary judgment on May 17, 1971. Mr. Raatz did not file affidavits in opposition to the affidavits filed by the employer respondents in connection with the summary judgment motions, nor did he appear at the hearing on said motions (CR 20/27-29; CR 32-48). The motions of the union respondents and the employer respondents were granted (CR 101/7-16) [3]

On June 3, 1971, Mr. Raatz advised petitioners' present counsel that he had not attended the hearing of the motions due to the fact that he had been in an automobile accident. Mr. Raatz further advised petitioners' present counsel that he intended to discuss the matter with the trial court or the clerk to see if it was possible to reopen the matter. Mr. Raatz stated that in any event he intended to file a notice of appeal on behalf of his clients from the judgments of dismissal (CR 30/21-30; CR 31/1-2).

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[2] "CR" refers to the clerk's record. The number preceding the slant bar is the page; the numbers following are the lines.

[3] Judgment granting respondent TIME-DC, INC.'s motion for summary judgment and dismissal of complaint with prejudice was entered on May 17, 1971; judgments granting the remaining respondents' motions for summary judgment and dismissal of complaints with prejudice were entered on June 8, 1971 (CR 101/7-16, 26-30).

About June 20, 1971, several of the petitioners succeeded in locating Mr. Raatz. At that time Mr. Raatz advised them that he had not appeared at the hearing because he had been hospitalized as the result of an automobile accident on the freeway, he also represented that he had conferred with the trial judge in private concerning their case and had already filed a notice of appeal on their behalf (CR 32/16-21; CR 40/12-16, CR 44/16-20). These representations were false. No notice of appeal was ever filed on behalf of the petitioners by Mr. Raatz, although at the time he made the representations it was still possible to file a timely notice of appeal from the several judgments.

Thereafter, the various petitioners spent the better part of the year following the entry of judgments attempting to track down Mr. Raatz (CR 32-48). Mr. Raatz also failed to appear to represent petitioner Juan Perez in a criminal matter pending in the Los Angeles County Superior Court (CR 36/25-32). Mr. Raatz's office was closed down; his telephone and answering service were disconnected; his home was abandoned and up for sale (CR 37/1-12). Complaints were made by several of the petitioners to the State Bar of California, but to no avail (CR 37/13-26; CR 45/1-19, 29-32; CR 46/1-8).

Sometime in December of 1971, petitioners read in the newspapers that a complaint had been filed by the District Attorney of Los Angeles County accusing Mr. Raatz of the commission of 27 felony offenses, ranging from possession of narcotics to grand theft (CR 45/10-14; CR 34/15-21). Petitioners learned that a preliminary examination was to be held in the criminal case pending against Mr. Raatz on February 18, 1972. Several of the petitioners confronted

Mr Raatz outside the courtroom on that date. Mr Raatz again falsely represented to petitioners that he had filed a notice of appeal on their behalf, and that he had turned the case over to Albert Galisky, Esq (CR 34/22-32)

Mr Galisky apparently knew little or nothing about the matter and did not have the file, which supposedly had been left with Mr Raatz's mother or sister (CR 34/28-32; CR 35/1-19) Mr Galisky promised petitioners that he would get the file for them by March 31, 1972 Petitioners never received the file (CR 35/19-21)

On or about May 8, 1972, petitioners consulted their present counsel, who checked the court file and found that no notice of appeal had ever been filed in the matter From that date until about May 30, 1972, petitioners' present counsel obtained affidavits from various petitioners stating their efforts to locate Mr Raatz and to ascertain if a notice of appeal had been filed for use in connection with a proposed motion to file an out-of-time notice of appeal On June 1, 1972, petitioners' present counsel filed the motion together with supporting affidavits However, the filing was cancelled inasmuch as petitioners' present counsel had not obtained a substitution of attorneys signed by Mr Raatz, who was still extremely difficult to locate (CR 57-58; CR 101/37-39) On June 12, 1972, petitioners' present counsel obtained a substitution of attorneys from Mr. Raatz, and, on June 14, 1972, a motion for permission to file an out-of-time notice of appeal was filed All respondents filed opposition thereto

The matter was heard on July 31, 1972, and the motion was denied The order denying the motion was entered on August 18, 1972 (CR 77-78) Petitioners filed a notice of

appeal from said order on September 12, 1972 (CR 88-90)

ARGUMENT

I The Trial Court Abused Its Discretion In Denying Petitioners Permission To File An Out-Of-Time Notice Of Appeal

A Federal Rule of Appellate Procedure 4(a) is not jurisdictional

While F R App P 4(a), which prescribes the time limits within which an appeal may be taken, would appear, at first blush, to be jurisdictional, it is petitioners' contention that it is not, and that the United States District Court, the United States Court of Appeals for the Ninth Circuit, and this Court have inherent equitable power to grant permission to file an out-of-time notice of appeal in order to correct a gross miscarriage of justice

United States Supreme Court Rule 22, which governs the time within which a petition for a writ of certiorari may be filed, would also appear to be jurisdictional However, this Court held in *Taglianetti v United States*, 394 U S 316, 89 S Ct 1099, 22 L Ed 2d 302, that the time limitation for filing a petition for a writ of certiorari is not jurisdictional and that failure to timely file petition did not bar the Court's exercise of discretion to consider the case See also, *Durham v United States* 401 U S 481, 91 S Ct 858, 28 L Ed 2d 200

It is submitted that the failure to timely file a notice of appeal does not bar the Court of Appeals' or the District Court's discretion to permit the filing of an out-of-time notice

of appeal

B Petitioners have shown "excusable neglect" within the meaning of F R App P 4(a) which would warrant the granting of leave to file an out-of-time notice of appeal

The affidavits filed by the petitioners in support of their motion for permission to file an out-of-time notice of appeal (CR 32-48) conclusively show that petitioners were denied their right to a full hearing on the merits of their action, which was summarily dismissed with prejudice due to the dereliction of duty on the part of their then attorney in failing to file affidavits in opposition to the respondents' motions and to appear and argue the matter at the time set for hearing of the motions

Petitioners' affidavits further show that they were denied the right to appeal from the adverse ruling of the trial court due to the fraud and willful misrepresentation practiced on them by their then attorney of record In other words, petitioners were not only denied their day in court by the misconduct of their attorney but also were forever foreclosed from seeking appellate review of the order of dismissal due to his fraud Certainly, this would be excusable neglect as far as the petitioners are concerned

It must be remembered that petitioners are laborers, mostly of Mexican birth or descent, unlearned in the law and the English language, who, to their misfortune, placed their trust in an officer of the court

It is submitted that any neglect on the part of these petitioners is excusable within the meaning of F R App P

4(a).

II. Due Process Of Law Necessarily Includes The Effective Assistance Of Counsel

The Fifth Amendment to the United States Constitution unequivocally declares that "[n]o person shall . . . be deprived of . . . property, without due process of law." Criminal cases have consistently held that due process of law includes the effective assistance of counsel ("The constitutional right to the assistance of counsel in a criminal case (U S Const , 6th Amend , 14th Amend ; see *Gideon v. Wainwright* [1963] 372 U S 335, 342 [9 L Ed 2d 799, 804, 83 S Ct 792, 93 A L R 2d 733]) includes the guarantee that such assistance be 'effective' (See *Powell v. State of Alabama* [1932] 287 U S 45, 72 . . .)" *In re Saunders*, 2 Cal 3d 1033, 1041) There is no reason why a different definition of due process should obtain in a civil case

It is respectfully submitted that a civil litigant is entitled to the effective assistance of counsel the same as a criminal defendant This is especially true where, as here, the civil litigants' cause of action against their former attorney for malpractice is non-existent

III. The Negligence And Willful Misconduct Of Petitioners' Trial Counsel Constituted "Excusable Neglect"

Respondents (Brief for Employer–Not Including TIME-DC, INC , pp 8-11; Union-Appellees' Brief, pp 4-5) contended, in effect, that it is too bad for petitioners that

they selected an attorney who sold them out by failing to act for them, and that since petitioners had a free choice at the time they chose Mr. Raatz to represent them, *c'est la guerre* (or whatever other kindly legal or nonlegal phrase one may wish to use to describe it).

What respondents contended is not true. In the first instance, the State of California, not petitioners, permitted and sanctioned Mr. Raatz to hold himself out as an attorney. Secondly, the United States District Court in the case at bar also represented to petitioners that Mr. Raatz was qualified to practice law before it and, in fact, permitted Mr. Raatz to practice before it. Not only did the court state that Mr. Raatz was qualified to practice before it, but it represented to the petitioners and the public at large that Mr. Raatz was an officer of the court. The records of the District Court show Mr. Raatz as a member of the bar of that court.

Respondents and the courts seem to say that when Mr. Raatz complies with the courts' rules, etc., he is, indeed, an officer of the court, but when he "goofs," whether it be a legal or nonlegal goof, and whether or not someone is physically and/or financially injured as a result thereof, Mr. Raatz is not then an officer of the court.

The types of arguments raised in respondents' briefs are the very matters that give attorneys in general and courts of law in particular a bad name in the eyes of the public.

Until quite recently, if a California attorney was guilty of malpractice, the statute of limitations ran from the time of the act, not the time of the discovery of same by the unsuspecting and trusting (stupid) client. Even the courts have seen the unfairness of such a scheme and held it to be

invalid (*Neel v. Magana, et al.*, 6 Cal 3d 176, 98 Cal. Rptr. 837, 491 P 2d 421)

Courts do not permit clients to control cases; they insist that the client let the attorney handle the case. That is, until something goes wrong Then, there is the pious cry that the client is stuck because he selected the attorney and because the client should have done something. Of course, no one ever says what it is the client should have done during this period of time when (1) he was unable to say or do anything because the court insisted that the attorney handle the matter, and (2) during the same period of time the client, who is a nonlawyer, is forced to rely on the expertise, etc., ad nauseum, of his attorney–(that is why he has an attorney –because he doesn't know the law and procedure and hires an attorney who is supposed to know it)

Here, we have an attorney who is up on a number of criminal charges. (The records of the Superior Court of the State of California for the County of Los Angeles, Criminal Case No. A-281469, of which the Court may take judicial notice, show that Mr. Raatz was convicted by a jury of violations of sections 11530 of the Health and Safety Code and 487.3 of the Penal Code and was, on December 4, 1972, committed to the California Department of Corrections pursuant to Penal Code § 1203.03). It is true that one would make a mistake to assume that this particular lawyer will be disbarred for what he has done in both the criminal context and in terms of what damage he has done to the petitioners at bar. The affidavits at bar show that his home has been sold, that his office has been closed, his phone disconnected, etc. Assuming that he is or is not disbarred, it is clear that he is either broke or judgment proof or both (if there is a distinction).

And assuming he eventually goes to prison (a commitment pursuant to Penal Code § 1203.03 is not a final commitment), it is quite clear that a civil lawsuit would be a futile gesture. Yet, respondents ask the Court, with a straight face, to tell petitioners that they are too late so far as an appeal goes, but they have a civil remedy against Mr. Raatz, namely, sue him! Again, it is no wonder that the public in general thinks that the law is a farce. To that extent, it is a farce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court abused its discretion in denying petitioners permission to file an out-of-time notice of appeal, and that this Court should grant certiorari and reverse the order appealed from, with directions to the court to permit petitioners to file a notice of appeal from the judgments of dismissal of the complaint with prejudice entered herein on May 17, 1971 and June 8, 1971.

Respectfully submitted,

DON EDGAR BURRIS

Attorney for Petitioners

APPENDIX

APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit

PHILLIP BURROUGHS, et al , Plaintiffs-Appellants, vs STERLING TRANSIT COMPANY, a California Corporation, et al , Defendants-Appellees

No 72-2699

[Filed April 10, 1973]

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER, WRIGHT, and TRASK, Circuit Judges

MEMORANDUM

This appeal is taken from the district court's denial of permission to file an out-of-time appeal from a final order granting judgment We affirm

Judgment granting the defendant TIME-DC, Inc.'s motion for summary judgment and dismissal of complaint with prejudice was entered on May 17, 1971; judgments granting the remaining defendants' motions for summary judgment and dismissal of complaint with prejudice were entered on June 8, 1971 The motion for permission to file an out-of-time notice of appeal was filed on June 19, 1972, more than a year after final judgment, as appellants admit

Under 28 U.S.C. § 2107 and Rule 4(a) Fed. R. App. P., a notice of appeal must be filed within thirty days from the entry of judgment or an additional thirty days if the district court finds excusable neglect is shown. Rule 26(b) Fed. R. App. P. provides that the court may not enlarge the time for filing a notice of appeal. Together with other circuits we have held that this is jurisdictional. *Alexander v. Sacha*, 439 F.2d 742 (9th Cir. 1971); *Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971). No relief may be granted.

The appeal is dismissed for lack of jurisdiction.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY 8TH, 1973, I served the within PETITION FOR WRIT OF CERTIORARI (BURROUGS, et al. v. STERLING TRANSIT COMPANY, etc., et al.) on the following named parties by depositing three copies, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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Department of Justice
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I declare under penalty of perjury that the foregoing is ture and correct.

Executed on MAY 8TH, 1973, at HUNTINGTON BEACH, CALIFORNIA.

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